

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

ANGELA KOLEBUCK-UTZ individually and  
on behalf of all others similarly situated,

Plaintiff,

v.

WHITEPAGES, INC.,

Defendant.

Case No. 21-cv-00053-JCC

WHITEPAGES, INC.'S  
MOTION TO DISMISS

**NOTE ON MOTION CALENDAR:  
April 2, 2021**

**I. INTRODUCTION**

Angela Kolebuck-Utz asks this Court to prevent Whitepages, Inc. (Whitepages) from providing its users with what she refers to as a “preview”<sup>1</sup> of directory information about a searched individual (Whitepages’ product) coupled with a list of pricing options for purchasing additional information. But her Complaint makes plain that Whitepages’ conduct does not fall within the conduct proscribed by Ohio’s right of publicity statute because she acknowledges that Whitepages may display her name in selling access to public information about her, and Whitepages displays no other information protected by the statute. In addition, the statute does not

<sup>1</sup> Whitepages does not agree that “free preview” accurately describes what Whitepages displays, but, for purposes of this motion, accepts that label. The information in what Kolebuck-Utz terms the “free preview” is directory information, and, not unlike the news provided for free by news media with a paywall, is not a “preview” of what is behind the paywall but is instead information provided for free.

1 apply because her name does not have “commercial value.” Finally, the First Amendment, Ohio’s  
2 Constitution, and the Communications Decency Act, 47 U.S.C. § 230, all protect Whitepages’ free  
3 display of directory information.

4 For each of these independent reasons, Kolebuck-Utz has failed to state a claim for which  
5 relief may be granted. *See* Fed. R. Civ. P. 12(b)(6). The Court should dismiss the action with  
6 prejudice and without leave to amend.

## 7 II. RELEVANT ALLEGATIONS

8 Kolebuck-Utz’s putative class action complaint accuses Whitepages of violating Ohio’s  
9 right of publicity statute, Ohio Rev. Code Ann. ch. 2741. Kolebuck-Utz alleges that Whitepages  
10 “operates a website [www.whitepages.com] that sells ‘background reports’ on people to the  
11 general public.” Dkt. 1 ¶¶ 1-2. Kolebuck-Utz alleges that members of the public can access  
12 www.whitepages.com to search the first and last name of any individual and receive a list of search  
13 results “correspond[ing]” to people whose names match the searched name. Dkt. 1 ¶¶ 3-4. She  
14 pleads that the search results provide a “limited, free preview” of the full background report and  
15 can include “the searched individual’s name (including middle initials), age, current city and state  
16 of residence, the searched individual’s relatives, and other identifying information.” Dkt. 1 ¶ 5.  
17 The information available via Whitepages—including the information provided on the “preview”  
18 page—is “compile[d]” from publicly available records and then displayed via its website. Dkt. 1 ¶  
19 13.

20 Kolebuck-Utz alleges that the “limited, free preview” of the searched individual’s  
21 information is designed “to entice users to purchase [Whitepages’] services.” Dkt. 1 ¶¶ 7-8.  
22 According to Kolebuck-Utz, to access the “preview” of a searched individual and pricing  
23 information to obtain more information, a Whitepages user must undertake a series of steps. The  
24 user must access www.whitepages.com, enter the searched individual’s name in the search field,  
25 and then click on the “Search” button. Dkt. 1 ¶ 4. She says this will pull up a listing of search  
26 results that match the name entered by the user, along with a “preview” of the information

available for each of the listed names. Dkt. 1 ¶¶ 4-5. From there, a user can access further information responsive to a search term only by clicking on “View Details,” “View Full Report,” “Unlock Full Report,” or “Sign Up” buttons located on the “preview” page. Dkt. 1 ¶ 9. Clicking one of those buttons leads the user to a pay screen which, according to Kolebuck-Utz, presents the user with various payment options, including “an option to pay for Whitepages’ monthly subscription services.” Dkt. 1 ¶¶ 9-10. According to the Complaint, Whitepages’ monthly subscription allows users to obtain background reports using its services for an unlimited number of searches per month. Dkt. 1 ¶ 12.

Depending on how a user accesses Whitepages’ payment option page, the searched name and other information (*e.g.*, age, names of relatives) may appear at the top of the payment page. Dkt. 1 ¶¶ 5, 10. Koblebuck-Utz alleges that Whitepages’ inclusion of the payment options at the bottom of the “preview” page violates Ohio’s right of publicity law. Dkt. 1 ¶¶ 14-15. She alleges that it “would be simple for Whitepages to maintain [its] business model while still complying with state law.” Dkt. 1 ¶ 16. Whitepages could, for example, “merely display the names of the searched individuals—without more identifying information—in their advertisements for their services.” Dkt. 1 ¶ 16.

### III. ARGUMENT

**A. A Claim Should Be Dismissed Where the Facts as Pled Establish That the Plaintiff Cannot Prevail.**

When determining whether a claim has been sufficiently pled to survive a Rule 12(b)(6) motion for “failure to state a claim upon which relief can be granted,” *id.*, a court “accept[s] factual allegations in the complaint as true and construe[s] the pleadings in the light most favorable to the non-moving party,” but need “not ‘assume the truth of legal conclusions merely because they are cast in the form of factual allegations,’” *Fayer v. Vaughn*, 649 F.3d 1061, 1064 (9th Cir. 2011) (citation omitted). “[C]onclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss.” *Id.* (citation omitted); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678

(2009) (“A pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action will not do.’” (citation omitted)). “Whether the case can be dismissed on the pleadings depends on what the pleadings say,” which means that “[a] plaintiff may plead herself out of court” if she “plead[s] facts which establish that [s]he cannot prevail on h[er] . . . claim.” *Weisbuch v. County of Los Angeles*, 119 F.3d 778, 783 n.1 (9th Cir. 1997) (citation omitted).

**B. Whitepages’ Use of Kolebuck-Utz’s Name Does Not Violate Ohio’s Right of Publicity Statute.**

Ohio’s right of publicity statute makes unlawful the “use” of “any aspect of an individual’s persona for a commercial purpose” absent “written consent.” Ohio Rev. Code Ann. § 2741.02(A)-(B). The statute defines “persona” to mean “an individual’s name, voice, signature, photograph, image, likeness, or distinctive appearance, if any of these aspects have commercial value.” Ohio Rev. Code Ann. § 2741.01(A).

According to Kolebuck-Utz, Whitepages violated Ohio’s right of publicity statute when it “use[d] [her] personal identifiable information to entice viewers to purchase [Whitepages’] subscription service.” Dkt. 1 ¶ 10. Kolebuck-Utz does not allege that Whitepages used her “voice, signature, photograph, image, likeness, or distinctive appearance” (Ohio Rev. Code Ann. § 2741.01(A)) in the “free, limited preview” about which she complains (Dkt. 1 ¶ 5), or otherwise (*see generally* Dkt. 1). That means she must prove that Whitepages used her “name” in violation of the statute, the only other definitional aspect of “persona.” Ohio Rev. Code Ann. § 2741.01(A). But she *pleads* that Whitepages would be in compliance with Ohio’s right of publicity statute if Whitepages “merely display[ed] the names of the searched individuals—without more identifying information—in their advertisements for their services.” Dkt. 1 ¶ 16. For this reason alone, Kolebuck-Utz’s claim against Whitepages fails as a matter of law.

Kolebuck-Utz also fails to allege facts which, if proven, could establish that her name “ha[s] commercial value” (Ohio Rev. Code Ann. § 2741.01(A)). According to Ohio case law, that deficiency means that her claim fails as a matter of law. In *Harvey v. Systems Effect, LLC*, 154

1 N.E.3d 293 (Ohio Ct. App. 2020),<sup>2</sup> the court held that Ohio’s statutory right of publicity  
2 requirements were “consistent with” common law principles it identified from the *Restatement*  
3 *(Third) of Unfair Competition*, including that “commercial value” means the plaintiff must prove  
4 “his or her ability to market [the name or likeness] for commercial purposes.” *Id.* at 308-09; *see*  
5 *also Roe*, 714 F. App’x at 568 (“While plaintiffs need not be national celebrities to assert a right of  
6 publicity claim,” under the Ohio statute, “they must at least ‘demonstrate that there is value in  
7 associating an item of commerce with [their] identity.’”) (citations omitted)). Thus, “the use of a  
8 person’s identity primarily for the purpose of communicating information . . . is not generally  
9 actionable,” except “if the name or likeness is used solely to attract attention to a work that is *not*  
10 *related to the identified person*” or “the work contains substantial falsifications.” *Harvey*, 154  
11 N.E.3d at 308 (quoting the *Restatement, supra*) (emphasis added). In *Harvey*, that meant that the  
12 plaintiff, who had failed to disclose termite damage in selling her home, had no right of publicity  
13 in her name such that she could prevent the defendant from using it in training materials it sold to  
14 real estate agents. *Id.* at 295, 309.

15 Kobleuck-Utz has failed to plead any facts from which the Court can infer that she has the  
16 “ability to market” her name “for commercial purposes” separate from the “commercial purpose”  
17 of “communicating information” connected by public records to her name as a search term. *See id.*  
18 at 308. That is, the only “commercial value” Kobleuck-Utz identifies for her name is that someone  
19 may be willing to pay Whitepages for the information it has related to her name as a search term.  
20 Under *Harvey*, that is insufficient because her name “is used solely to attract attention to” a  
21 product *directly related* “to the identified person.” *Id.* at 308. Accordingly, her claim “[i]s not  
22 within the claims intended to be protected under [Ohio’s right of publicity] statute.” *Id.* at 295.

23  
24  
25 <sup>2</sup> While *Harvey* is an intermediate state appellate court decision, there is otherwise “a paucity of precedent” regarding  
26 the statute, *Roe v. Amazon.com*, 170 F. Supp. 3d 1028, 1032 (S.D. Ohio 2016), *aff’d*, 714 F. App’x 565 (6th Cir.  
2017), and no reason to conclude that the Supreme Court of Ohio would decide otherwise, *see T-Mobile USA Inc. v.*  
*Sel. Ins. Co. of Am.*, 908 F.3d 581, 586 (9th Cir. 2018) (“An intermediate state appellate court decision is a ‘datum for  
ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data  
that the highest court of the state would decide otherwise.’” (citation omitted)).

1 In addition, the provision of that information by Whitepages (her name as a search term and  
2 information gathered from public records related to that search term) is, as a matter of law, not  
3 “commercial speech” and therefore does not have “commercial value.” Directory information is  
4 noncommercial speech and therefore is entitled to the highest level of First Amendment protection.  
5 *Dex Media W., Inc. v. City of Seattle*, 696 F.3d 952, 963 (9th Cir. 2012) (“telephone listings and  
6 community information contained in the directory constitute noncommercial speech”). The fact  
7 that Whitepages provides some of the information on a subscription basis does not change the  
8 character of the speech. *Id.* at 963 (holding that “[a] newspaper or magazine could be subscription-  
9 only and contain no advertisements” and would still be entitled to full First Amendment protection  
10 and therefore strict scrutiny of any state law restrictions); *Nieman v. VersusLaw, Inc.*, 512 F. App’x  
11 635, 638 (7th Cir. 2013) (“The for-profit nature of the defendants’ aggregation websites does not  
12 change the analysis; speech is protected even when ‘carried in a form that is “sold” for profit.’”  
13 (citation omitted)). Because the alleged sale of Kolebuck-Utz’s name in connection with selling  
14 directory information is not “commercial speech,” her name cannot be said to have “commercial  
15 value.”

16 Kolebuck-Utz concedes that Whitepages may use her name in selling a subscription  
17 product in response to a search for her name. In addition, her name does not have “commercial  
18 value” as that term has been interpreted by an Ohio court or under First Amendment jurisprudence.  
19 For each of those independent reasons, Whitepages’ use of Kolebuck-Utz’s name in the “free  
20 preview” in response to a search for her name does not fall within Ohio’s statutory definition of  
21 “persona” (Ohio Rev. Code Ann. § 2741.01(A)) and therefore does not violate the statute.

22 **C. Whitepages’ Content—including the “Free Preview”—Is Protected by the First**  
23 **Amendment and the Ohio Constitution.**

24 Independently, the Court should dismiss the action because the First Amendment to the  
25 United States Constitution and Section 11, Article I of the Ohio Constitution (Section 11) protect  
26

1 Whitepages' display of directory information related to Kolebuck-Utz as a search term.<sup>3</sup> Even  
2 though Kolebuck-Utz alleges that the "preview" solicits money in exchange for additional  
3 information, the "preview" itself (like the additional information) displays noncommercial speech  
4 protected by the First Amendment.<sup>4</sup> Application of the Ohio statute to it is a content-based  
5 restriction that cannot survive strict or even intermediate scrutiny.

6       *The "preview" is noncommercial speech.* The "free preview" Kolebuck-Utz pleads  
7 violates Ohio law is itself directory and other public information that is noncommercial speech  
8 protected by the First Amendment. *Dex Media W.*, 696 F.3d at 957 (directory information is  
9 noncommercial speech); *see also Nieman*, 512 F. App'x at 637 (companies selling public  
10 information about people, including court records, were equally protected by the First Amendment  
11 as the media, citing *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 496 (1975)); *cf. Citizens*  
12 *United v. FEC*, 558 U.S. 310, 342 (2010) ("First Amendment protection extends to corporations").

13  
14       [S]peech does not lose its First Amendment protection because money is spent to  
15 project it, as in a paid advertisement of one form or another. Speech likewise is  
16 protected even though it is carried in a form that is "sold" for profit, and even  
though it may involve a solicitation to purchase or otherwise pay or contribute  
money.

17 *Virginia State Bd. of Pharm. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761  
18 (1976) (citations omitted)). It is inconsequential that the subscription may offer directory  
19 information of others besides Kolebuck-Utz. Were it otherwise, an online newspaper with a  
20 paywall would lose First Amendment protection over a preview of a news article displayed with an  
21 advertisement to subscribe.

22  
23 <sup>3</sup> The Ohio Supreme Court has held that the "First Amendment is the proper basis for interpretation of Section 11" in  
24 recognition that free speech guarantees under the Ohio Constitution "are no broader than those guaranteed by the First  
Amendment to the United States Constitution." *Cleveland v. Trzebuckowski*, 709 N.E.2d 1148, 1152 (Ohio 1999)  
(citing *Eastwood Mall, Inc. v. Slanco*, 626 N.E.2d 59, 61 (Ohio 1994)). Accordingly, and for conciseness, Whitepages  
will refer to the First Amendment and Section 11 collectively as the First Amendment.

25 <sup>4</sup> The Ohio General Assembly recognized that it could not infringe constitutional rights by legislation, providing in the  
26 statute that the statute "does not apply to . . . use of the persona of an individual that is protected by the First  
Amendment to the United States Constitution as long as the use does not convey or reasonably suggest endorsement  
by the individual whose persona is at issue" and "does not affect rights or privileges recognized under the Ohio  
Constitution or United States Constitution." Ohio Rev. Code Ann. § 2741.09(A)(6), (B).

1 Even if the “free preview” itself were not protected speech, “[a] simple profit motive to sell  
2 copies of a publication or to obtain an incidental economic benefit, without more, does not make  
3 something commercial speech. Otherwise, virtually any newspaper, magazine, or book for sale  
4 could be considered a commercial publication.” *Ariix, LLC v. NutriSearch Corp.*, 985 F.3d 1107,  
5 1117 (9th Cir. 2021). That is, an advertisement for speech protected by the First Amendment  
6 which merely previews the protected speech is itself protected by the First Amendment. *Id.*; *see*  
7 *also Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 67 n.14 (1983) (although pamphlet  
8 providing public health information along with advertisement for contraceptives was commercial  
9 speech, “a different conclusion may be appropriate in a case where the pamphlet advertises an  
10 activity itself protected by the First Amendment”).

11 *Ohio’s statute is a content-based restriction.* Ohio’s statute is a “content-based restriction”  
12 because “by its very terms, [it] singles out particular content” (here, information about a person)  
13 “for differential treatment.” *Dex Media W.*, 696 F.3d at 957 (quoting *Berger v. City of Seattle*, 569  
14 F.3d 1029, 1051 (9th Cir. 2009) (en banc)).

15 *Suppressing Whitepages’ speech is not warranted.* Because the “free preview” is  
16 noncommercial speech and the statute is a content-based restriction, strict scrutiny applies. *See*  
17 *Dex Media W.*, 696 F.3d at 965. Strict scrutiny means Ohio’s statute must be “the least restrictive  
18 means available to further a compelling government interest.” *Id.* (quoting *Berger*, 463 U.S. at  
19 1050). If there is no compelling government interest or the statute is not the least restrictive means  
20 to further that interest, the statute cannot be applied to suppress Whitepages from providing  
21 directory information on its website. “[O]nly in the most extraordinary circumstances” is this  
22 standard met. *Id.* (quoting *Bolger*, 463 U.S. at 65).

23 If, on the other hand, the Court determines that Whitepages’ “free preview” is commercial,  
24 intermediate scrutiny applies. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 572 (2011). Intermediate  
25 scrutiny requires that Ohio’s statute “directly advance[] a substantial governmental interest and” be  
26 “drawn to achieve that interest.” *See id.*

1 Under either level of scrutiny, the proponent of the regulation (here, Kolebuck-Utz)—not  
2 the regulated speaker (here, Whitepages)—has the burden of proof. *See United States v. Playboy*  
3 *Ent. Grp., Inc.*, 529 U.S. 803, 816-17 (2000) (collecting cases involving commercial and  
4 noncommercial speech and holding that “[c]ontent-based regulations are presumptively invalid,”  
5 and” the proponent of the regulation “bears the burden to rebut that presumption” (citation  
6 omitted)).

7 While “speech which either appropriates the economic value of a performance or persona  
8 or seeks to capitalize off a celebrity’s image in commercial advertisements is unprotected by the  
9 First Amendment against a [state law] right-of-publicity claim,” the government “*has no interest*”  
10 in protecting a right of publicity in a person who has not “‘ma[de] the investment required to  
11 produce a performance of interest to the public,’ or invest[ed] time and money to build up  
12 economic value in a marketable performance or identity.” *Sarver v. Chartier*, 813 F.3d 891, 905  
13 (9th Cir. 2016) (citation omitted) (emphasis added).

14 Nothing in Kolebuck-Utz’s complaint suggests that she is a person for whom a statute  
15 restricting speech based on a right of publicity overcomes the First Amendment. *Sarver* is  
16 dispositive of Kolebuck-Utz’s claim.

17 **D. The Communications Decency Act Immunizes Whitepages from Claims That Its**  
18 **Content Violates State Law.**

19 Kolebuck-Utz’s claim also is barred by the Communications Decency Act (CDA). The  
20 CDA provides that “[n]o provider or user of an interactive computer service shall be treated as the  
21 publisher or speaker of any information provided by another information content provider,” thus  
22 immunizing service providers from liability for any information created by a third party. 47  
23 U.S.C. § 230(c)(1), (e)(3); *see also Perfect10, Inc. v. CC Bill LLC*, 488 F.3d 1102, 1119 (9th Cir.  
24 2007) (CDA immunity applicable to state law right of publicity claims). While CDA immunity  
25 does not apply to “the creation of content” by a website, *Perkins v. LinkedIn Corp.*, 53 F. Supp. 3d  
26 1222, 1246 (N.D. Cal. 2014) (citing 47 U.S.C. § 230(f)(3)), nothing in Kolebuck-Utz’s complaint

1 suggests that Whitepages creates or otherwise alters the content displayed when a user searches for  
2 a person using www.whitepages.com. *See Carafano v. Metrosplash.com*, 339 F.3d 1119, 1125  
3 (9th Cir. 2003) (section 230 immunity applies where website “did not play a significant role in  
4 creating, developing or ‘transforming’ the relevant information”).

5 To the contrary, Kolebuck-Utz alleges only that Whitepages “compiles and generates the  
6 content it sells on its website,” content originating from and developed by sources other than  
7 Whitepages. Dkt. 1 ¶ 13 (“Whitepages offers . . . contact information and criminal records . . .  
8 compiled from records in all 50 states.”). In other words, Kolebuck-Utz alleges that Whitepages,  
9 like an ordinary search engine, is merely a “passive transmitter of information provided by others.”  
10 *Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1166 (9th  
11 Cir. 2008) (en banc) (search engines “play no part” in development of searches and therefore  
12 entitled to section 230 immunity). Consequently, Whitepages, as an “intermediary . . . indifferent  
13 to the content of what it transmits,” *Backpage.com, LLC v. Dart*, 807 F.3d 229, 233 (7th Cir.  
14 2015), is entitled to immunity under section 230, as other courts already have recognized, *Obado v.*  
15 *Magedson*, 612 F. App’x 90, 93 (3d Cir. 2015) (affirming trial court’s determination that  
16 Whitepages was internet host provider entitled to immunity under the CDA); *Nasser v.*  
17 *WhitePages, Inc.*, No. 12-097, 2013 WL 6147677, at \*3 (W.D. Va. Nov. 22, 2013) (Whitepages  
18 “clearly an interactive computer service within the meaning of the [CDA]” because “data is created  
19 and provided by third parties”). The Court should dismiss Kolebuck-Utz’s claim against  
20 Whitepages on section 230 grounds alone.

21 **E. Dismissal Should Be without Leave to Amend and with Prejudice.**

22 Kolebuck-Utz’s claim against Whitepages fails as a matter of law and cannot be cured by  
23 amendment because no matter how she pleads, the First Amendment and the CDA protect  
24 Whitepages against her claim. Where, as here, the deficiency in a complaint cannot be cured by  
25 amendment, dismissal of the action with prejudice and without leave to amend is appropriate.  
26 *Parents for Priv. v. Barr*, 949 F.3d 1210, 1239 (9th Cir. 2020) (affirming dismissal with prejudice

1 and without leave to amend for failure to state a claim because “amendment would simply be a  
2 futile exercise”).

3 **IV. CONCLUSION**

4 For the foregoing reasons, Whitepages requests the Court dismiss Kolebuck-Utz’s action  
5 with prejudice and without leave to amend.

6 DATED this 25th day of February, 2021.

7 HARRIGAN LEYH FARMER & THOMSEN LLP

8  
9 By: s/ Timothy G. Leyh

10 By: s/ Tyler L. Farmer

11 By: s/ Kristin E. Ballinger

12 Timothy G. Leyh, WSBA #14853

13 Tyler L. Farmer, WSBA #39912

14 Kristin E. Ballinger, WSBA #28253

15 999 Third Avenue, Suite 4400

16 Seattle, WA 98104

17 Tel: (206) 623-1700

18 Fax: (206) 623-8717

19 Email: timl@harriganleyh.com

20 Email: tylerf@harriganleyh.com

21 Email: kristinb@harriganleyh.com

22 *Attorneys for Whitepages, Inc.*